No. 3525.

United States
Circuit Court of Appeals
For the Ninth Circuit

JULIA MOSHER COLLINS, WILLIAM B. LOUNT AND HATTIE L. MOSHER,
Appellants,

vs.

CITY OF PHOENIX, A Municipal Corporation,
Appellee.

Appellant's Brief

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v.
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Appellee.

BRIEF OF APPELLANT.

Statement of the Case.

This appeal is brought by Julia Mosher Collins, et al., to reverse the judgment of the United Sttaes District Court for the District of Arizona, rendered against plaintiffs below, and appellants herein.

Appellants allege in their complaint that for upwards of forty-eight years they and their predecessors in interest have been, and now are, the owners in fee and in undisturbed possession of a tract of land now situate within the boundaries of the City of Phoenix, Arizona, and during the intervening years, and now, known as the Lount Tract, extending from the intersection point of section line on the North side of Van Buren Street between Sections 8

and 5, to the East side of Center Street, East to Second Street, a distance of 704 feet; thence North to Taylor Street; thence West to Center Street; thence South to the place of beginning;

That the strip of land in issue being 33 feet wide, extending from the East side of Center Street and running thence East 704 feet along the North side of the section line between Sections 8 and 5, Township 1 North, Range 3 East, Gila and Salt River Base and Meridian, in Maricopa County, Arizona, to a point; thence North 33 feet to a point; thence West 704 feet to a point; thence South 33 feet to the place of beginning, was and is now, an integral and component part of the said Lount Tract;

That no part of said tract has, by appellants, or by any authorized agent of theirs, ever been platted or in any manner conveyed or dedicated to the public use as a highway or street. (Tr. p. 5, V.)

That appellants, in their use, occupation and development of said tract, for mercantile and sale purposes, for themselves and for the convenience of their employees and tenants, have heretofore left thereon, as an open space, abutting on the North side of Van Buren Street, certain paths and driveways of the strip of land in controversy, for mer-

cantile and sale purposes, and for the convenience of their employees and tenants, and have connected same with other paths and driveways leading to other open spaces and driveways in said Lount Tract; that in the use of same appellants have never objected, and do not now, seek to restrain the public from traveling over the open spaces they had provided for their own use and purposes in the development of their property interest in said tract; the permissive right so given the public being limited to the right to travel over the same, (Tr. p. 5, 6, VI); that during the intervening years down to the 23rd day of July, 1919, said strip of land in issue was in the undisturbed possession of appellants and their predecessors in interest, and the City of Phoenix, until the last mentioned date, at no time claimed or asserted ownership of same.

Defendant pleads: that ever since the time the title to said strip of land was acquired from the government by the predecessors of interest of Plaintiffs, said strip has been recognized, used and occupied by the public, with the full knowledge, acquiescence and consent of the plaintiffs and their predecessors in interest, as a public road, highway or street. (Tr. p. 23);

That for more than twenty years prior to the institution of this suit, the said strip of land has been

used and occupied as a public highway and street of defendant, and defendant has been in open, notorious, peaceable, adverse and exclusive possession and control of said strip of land as a part of said street devoted and dedicated to public use. (Tr. 25-26.)

The case was tried before the court without a jury, which court rendered a judgment in favor of defendant and against the plaintiffs, deciding:

1. That defendant is in lawful possession of said strip of land as a part and parcel of Van Buren Street, and possesses full power and authority to improve the same and otherwise deal with the same as a public highway and street of said city;
2. That the plaintiffs, and neither of them, have any right, title and interest in and to the said land, or any part thereof;
3. That plaintiffs are not entitled to recover in this action;
4. That the defendant is entitled to judgment against said plaintiffs for its costs. (Tr. p. 35.)

The questions involved are:

1. Can the undisputed owners of a large tract of land be divested of their title and possessory rights, without dedication, to a described part of same, by reason of having for their own use, occupation and development of the whole tract, left the said designated part open for the convenience of their tenants, employees and servants and have never objected and are not now objecting to the public traveling over said described smaller tract?

2. Can the defendant, City of Phoenix, by ordinance, acquire title to the strip of land in issue without condemnation proceedings required by the eminent domain laws of Arizona?

3. Can appellants' permissive use to the public, limited, and exercised only to travel over the land, and not as a matter of right, ripen into a lawful possession of the appellee with full power and authority to improve the same and otherwise deal with the land as a public highway or street?

I. ASSIGNMENT OF ERROR No. 1.

The Court erred in ignoring the unimpeachable testimony of Hattie L. Mosher, Victor A. Redewill and Eugene Redewill, who substantially had grown from infancy to woman and manhood on or near the property, in that:

Hattie L. Mosher testified: Samuel D. Lount went into possession of said Lount Tract September 21, 1881, and it has ever since been in the possession of the family, and this strip of land in connection with the other land north was just farming, ranch land, and was so used consecutively until 1895, when the right of way to the street car people was given, (Tr. p. 45); that she had a rose garden there after 1895, and the last remains of that stood until 1901, and some of the roses remained there in 1909. This strip was enclosed in a barbed wire fence, as shown by Mr. C. J. Dyer's sketch map. (Tr. p. 46.) plaintiffs and predecessors have never dedicated to the city or public, use of this strip of land, or any part of it, and until now the City or public have never asserted any right in the strip—plaintiffs have never objected, and are not now objecting to the public traveling over same. "We left the open spaces to enhance the value of our property and for our own convenience and for the

convenience of our tenants and customers, and so that if in the future we ever wanted to sell any property to others outside of the family, we would have the tract so arranged we could give them right of way." "I paid taxes on that strip and consider I am so doing now. The Lount Tract was always assessed in its entirety. In the last ten years it has been designated by blocks." (Tr. p. 47, 48.)

VICTOR A. REDEWILL testified: The strip north of the wire fence was cultivated down to 1902 or 1903. * * This was generally called Van Buren Street * * * The street wasn't used very much. They used Second Street and when they did go, they went on the south side of the street which would be south of the section line (Tr. p. 53.)

EUGENE REDEWILL testified: Mrs. Mosher's father's property was in a great big square by itself. Streets were not cut through. It was possible to get through from Center Street on Van Buren Street, but it wasn't a road that was used at all. * * I don't believe there was any street through there that was recognized as any kind of a street at all until after 1900, probably a year or two before 1905; and

A. S. MILLS testified there was travel over the road in 1905 and 1906; the wagon road was crowd-

ed to the south side. * * It wasn't a real street, a passable street, and all travel was by the streets to the south. * * * I do not know whether it was regarded as a street. * * * It wasn't used as a street. * * * It isn't to-day much of thoroughfare. (Tr. p. 50, 51, 77.)

For the reason:

A. The said testimony was direct, material and competent in support of the complaint, that plaintiffs were owners in fee in possession, that it was an intregal and component part of the Lount Tract and there had never been any dedication other than a permissive right to travel over the strip in issue, that this permissive right the public, nor the defendant, had exercised for twenty years, as found by the court:

B. That admission of defendant's exhibits as evidence from 4 to 19 inclusive, (Tr. p. 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93.) was admitted over objections of plaintiffs (Tr. p. 64), in that: said testimony was immaterial, irrelevant and incompetent, and did not tend to prove any issue in the case, as all of the transactions sought to be given in evidence were during a less period than twenty years, and in no manner supports the Court's finding of facts;

C. The admission of the records of the Board of Supervisors of Maricopa County of March 18, 1871, and May 15, 1871, (Tr. p. 64), is incompetent as evidence for the reason that the land had been prior to this time segregated from the public domain by the presumptive declaratory statement of David Twomey in the month of January, 1871, (Tr. p. 107.)

D. Defendant's exhibit No. 1, (Tr. p. 78, 79), bears no date, and no inference arise, it was executed more than twenty years since.

E. The admitting in evidence by the Court of ordinance No. 275 (Tr. p. 56, 57, 58), ordinace No. 193, (Tr. p. 60, 61, 62,) was immaterial, irrelevant and incompetent, not tending to prove any issue in the case, but tending to prejudice the rights of appellants by the unfair assumption that by force of these ordinances the City of Phoenix acquired any or all the rights and title to plaintiff's property enumerated in the Court's findings of fact. (Tr. p. 33, 34, 35.)

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II. ASSIGNMENTS OF ERROR Nos. 2, 3, 4, 5.

The Court erred in said conclusions of law Nos. 1, 2, 3, 4, 5, (Tr. p. 39), in that:

Said conclusions of law are not based upon any competent, relevant and material evidence, and are in conflict with direct and positive evidence, uncontroverted, submitted by plaintiffs, that there had been no dedication of the strip of land in issue; that the only right of travel over same had been permissive—a mere license—that their ownership was and had been, since 1881, a fee; that the use of defendant had not been adverse; that no prescriptive right by use of twenty years had been acquired.

ARGUMENT.

The record of this case bears out in every particular the contention of appellants that there has never been any intention to dedicate the strip of land in dispute; and the contention of appellees

that certain acts and circumstances constitute a dedication is in conflict with the best and ruling authorities in this country. The appellants admit that they permitted the public to travel over the land, but simply by an easement, which did not give the appellee the right to disturb the soil, a right to tear up the street, or a right to exclusive possession to improve or alter existing conditions, as held in City and County of San Francisco v. Grote, 52 Pac. at page 120:

> "It is not a trival thing to take another's land. The court will not lightly declare a dedication to public use. It is elementary law that an intention to dedicate upon the part of the owner must be plainly manifest."

The case of Darling v. Mayor, etc., of Jersey City, 67 Atl. 709, at page 710, in many features is, as regards dedication, similar to the one at bar. There, as here, the City claimed that by reference contained in twelve deeds to the Fowler Official Map, there was a tender of dedication; there, as here, the only acceptance alleged is the use of the street by the public and the adoption of said map in assessments. Held: "That title in complainant, once fixed by conveyance to him, must be presumed

to continue in him until the contrary shall be shown affirmatively." (p. 910, 711.)

The Town of West Point v. Bland, 56 S. E. 802, (Va.) held:

"In order to constitute a dedication, there must be an intention to appropriate the land for the use and benefit of the public; the acts and declarations of the land owner indicating such intention must be unmistakable in their purpose and decisive in character to have that effect (p. 804) * * * the ownership of land, once had, is not to be presumed to have been parted with; acts and declarations relied on to show a dedication should be unequivocal and decisive, manifesting a positive and unmistakable intention on the part of the owner to permanently abandon his property to the specific public use"; holding further, "where the mere use by the public of the supposed street, although long continued, should be regarded as a mere license, revocable at the pleasure of the owner."

Cincinnati & M. V. R. Co. v. Village of Roseville, 81 N. E. 178, (Ohio), held:

> "To show the establishment of a street by a common law dedication, it is essential to prove clearly that the owner of the land intended to donate it for that use; and to prove also an acceptance." (p. 179.)

There, the street had been used for forty years by the public, held; simply as a permissive right.

The case of Hartley v. Vermillion, decided by Judge Garoutte in 70 Pac. at page 273, is analogous in the issues raised and discussed, similar to the one at bar on the question of effect of evidence of travel by the public. Held: "The finding that the strip of land in question was traveled and used by the public ever since 1872 with the knowldege of the plaintiff and without objection on his part, is only a finding of probative facts tending to prove a dedication; but the fact of dedication—which, by the way, is neither alleged nor found—does not necessarily follow from these probative facts, since they are not necessarily inconsistent with a total absence of intention to dedicate and may indicate merely a license. The finding that the strip of land is public highway, whether deemed an ultimate fact or a conclusion of law, is not justified. The evidence on the part of the defendant was sufficient to justify the finding as to the user by the public with the knowledge of the plaintiff and without objection from him, but nothin more in favor of the defendant. As this finding is obviously insufficient to support the judgment, I think the order and judgment appealed from should be reversed. * * * Dedication is a pure question of

fact. The intention of the owner to dedicate is a vital element in every case, and that intention is also a pure question of fact. A mere permissive user by the owner, of land, for a highway, never can amount to a dedication; that is a user by license and nothing more, and of itself never would ripen into a dedication, no matter how long continued. * * Long continued adverse user by the public could be adverse if the owner consented to prescription, but it cannot amount to a dedication. It is not plain that the user of a highway by the public could be adverse iftheowner consented to the user, and dedication always involves the assent of the owner of the land. If he objects to the use, if the use is against his assent, that fact disproves any intention on his part to dedicate. It is said in the City of Los Angeles v. Kysor, 125 Cal. 465, 58 Pac. 91: "In all those cases where it is claimed that dedication is created in pais, it may be said that there is no amount of evidence which will justify the Court in instructing the jury that dedication is conclusively shown. The owner's intention is the all important element in creating a dedication, and that intention is a question of fact. It never can be a matter of law.' * * It is perfectly evident that the appropriation of land by the public is not a dedication, and, to justify a finding of fact by a

trial court that the owner has dedicated his land to public use as a highway, the evidence must be plain and convincing that such was his intention. * * * Some claim is made that the public have obtained rights to the road by prescription. There is nothing in this claim. Time of user is not a material element in creating a dedication of a highway; but, for the public to acquire an easement in land by prescription for a highway, it is a most material element. Yet continued user by the public for the statutory period of limitations is not sufficient to vest rights. As in all other cases of title acquired by prescription, the user must be adverse. A permissive user will never ripen into a right by prescription. In this case there was no adverse user and no claim of right that this court can discover from the evidence. Certainly, defendants never thought the public was claiming a right in this land adverse to them. They saw nothing to to put them upon inquiry as to that kind of a claim. The claim of right, as in all other cases of adverse possession, must be open and notorious, and here there was nothing of this kind."

The testimony of H. R. Patrick (Tr. p. 65, 66, 67, 68,) for appellee certainly is of little force. The statement that he surveyed for Conyors in 1880 is not followed by any testimony that the survey so

made was known to Samuel D. Lount or recognized by him, and it does not appear that the survey was of record. He states that he set off 33 feet on the north side for the County Road, and laid off 33 feet on the south side of the section line of the property in dispute. He saw no fences there at that time and he did not know of fences that Lount may have afterward placed on the property.

The testimony of GEORGE KIRKLAND, (Tr. p. 70, 71,) to the effect that taxes were paid on the Lount Tract by appellant until 1910, after that, he says: "They did pay more taxes because it was not assessed in acre tracts. The city made the change and subdivided the blocks for their own convenience."

The testimony of A. S. MILLS, (Tr. p. 77), referring to fences: "There was a fence about the middle of what is now the present Van Buren Street or about 25 feet from Mr. Porterie's fence.

All this testimony is in line with the testimony of plaintiff's that their purchase and holding were to the north line of the section line between sections 8 and 5.

That appellees contentions are so far afield of common law rights, and are so insistent of the trend, to measure all rights by the ever green and

growing pastures of the statute law and construction, are not to be commended.

In conclusion, we earnestly insist that by reason of the numerous errors pointed out, the judgment of this Court should be reversed, with directions to enter judgment for appellants.

Dated: Phoenix, Arizona, this 2nd day of September, 1920.

J. B. WOODWARD,
Phoenix, Arizona.
Attorney for Appellants.